

JURISPRUDENCE

(According to GNDU course Guidelines)

LLB 1st Semester

EXCELLENT CAREER SOLUTION (LLB)

Paper: III

Max. Marks: 100

Section-A: consists of **10 compulsory questions of 2 marks** each. Answer to each question is to be in five lines.

Section-B: consists of **12 questions of 6 marks each**. Answer to each question is to be in 2 pages. Three questions are to be set from each unit & the candidates are required to **attempt two questions from each unit**.

Section-C: consists of **four questions of 16 marks**. Answer to each question is to be in 5 pages. One question is to be set from each unit and the candidates are required to **attempt any two questions**.

Chapter wise Table of the Content of Unit-4:

Units	Chapters	Topics
Unit-4	Chapter-4.1	Analytical School
	Chapter-4.2	Pure Theory of Law by Hans Kelson
	Chapter-4.3	Personality

Unit-4

➤ Chapter-4.1 : Analytical School

- Reasons for its Emergence
- Jeremy Bentham's Utilitarianism
- John Austin's Command Theory
- Herbert Lionel Adolphus Hart's Primary and Secondary Rule
- Indian Perspective of Analytical School

➤ Chapter-4.2 : Pure Theory of Law

- By Hans KELSON

➤ Chapter-4.3 : Personality

- Meaning

➤ Chapter-4.4 : Judgements

- Shiromani Gurdwara Prabandhak Committee Vs. Som Nath Dass, AIR 2000 SC1421.

Chapter- 4.2

Pure Theory of Law

Introduction: Hans Kelson was another jurist who has the credit of reviving the original analytical legal thought in the 20th century through his 'Pure Theory of Law.' He was regarded as Vienna School. He was born at Prague in Austria in 1881 and was Professor of Law at the Vienna University. He was also the judge of Supreme Constitutional Court of Austria for 10 years during 1920-1930.

His theory is also known as 'Kelson's Pure Theory of Law'.

Kelson did not favour widening the scope of jurisprudence by co-relating it with all social sciences and rigorously insisted on separation of law from politics, sociology, metaphysics and all other extra-legal disciplines. Like Austin, Kelson divested moral ideal or ethical elements from law and wished to create a 'pure science of law devoid of all moral and sociological considerations'.

Kelson rejected Austin's definition of-

- Law as a Command
- Discards the notion of justice as an essential element of law.

Kelson does not admit command theory of Austin. The Pure theory of law is a theory of positive law. Pure theory of law is concerned solely with part of knowledge which deals with law, excluding from such knowledge, everything which does not strictly belong to the subject matter of the law. The Pure theory of law clearly defines its objects of knowledge. The pure theory of law as a specific science of law considers legal norms not as natural realities, not as facts in consciousness but as meaning contents. To free the theory of law from this element is the purpose of pure theory of law. It separates the concept of legal norms from that of moral norms and establishes the law as a specific system independent even of the moral law.

The law or the legal order is the system of legal norms. A norm becomes a legal norm only because it has been constituted in a particular fashion, having a definite rule. Law is valid only as positive law i.e. constituted law. Therefore, the

basic norm of law can only be the fundamental rule according to which the legal norms are to be produced. The Law regulates its own growth and its own making. The **task of legal theory is to clarify the relationship between fundamental and other lower norms.**

LAW AS A NORMATIVE SCIENCE- According to **Kelson**, "**Law is the normative science and it is not a natural science**" which are based on cause and effect such as law of gravitation. Norm is a rule forbidding or prescribing certain behaviour. **Law norms are the 'ought' norms. These legal 'ought norms' differ from 'morality norms'.** In this respect that former are backed by physical compulsion.

For instance-

A commits a theft, he ought to be punished.

Like Austin, Kelson considers **sanction as an essential element of law but he prefers to call it 'norm'** Thus Kelson called "law is a primary norm which stipulates sanction." It is positive law because it is concerned only with actual and not with ideal law.

The idea of Grund Norm may be said to be foundation store of the pure theory.

GRUND NORM:-

Grund Norm is the **original norm** or the **basic norm** which **gives validity to other norms which have derived from it.** He called it as initial norm or initial Hypothesis. The Grund Norm is the starting point in the legal system from this base, legal system broadens down and became more and more detailed and specific. He says that this process is of dynamic character. It means this process is **dynamic process.**

He calls **Austin's theory as Statics and criticise it.** In every legal system, there is always a grund norm through it may vary in different legal system.

For example:- In **Britain**, the **Grund Norm is the crown.**

In **India and U.S.A**, it is the **constitution.**

The Grund Norm can be recognized by minimum effectiveness which it possessed, but any discussion about the nature and origin of Grund Norm is not

within the province of pure theory of Law. These are the legal questions with which jurists are not concerned.

The task of legal theory is only to classify the relationship between Grund norm and other Inferior norms and not to enter into any questions about the goodness and badness of Grund Norm. Therefore, **before applying the Kelson's theory to any legal system, one must discover the Grund Norm.**

PYRAMID OF NORMS:-

Kelson considers **legal science as a pyramid of norms with Grundnorm** (base norm) at the Apex. **The subordinate norms are controlled by norms superior to them in hierarchial order.** The Grundnorm is independent of any other norm being at the apex. The process of delivery power from norm superior to it till Grundnorm has been termed as **"Concretisation"** of legal system.

Essential Foundations or Salient Features of Kelson's theory:-

To summarise, the main foundations of this theory are:-

- i. The **aim of the theory** of law, as of any science is **to reduce the chaos.**
- ii. **Legal theory is a science**, It is the knowledge of what the law is and what the Law ought to be.
- iii. **Law is a normative** and not a natural science.
- iv. Legal theory is a **theory of norms.**
- v. The theory of laws is **formal and changes in a specific way.**
- vi. It is formal theory confined to a **particular system of positive law as actually in operation.**

Implications of Pure theory:

There are many implications of his theory such as-

- I. **Law & state are not two different things.**
- II. **No difference between public & private law.**
- III. **No difference between natural & juristic person**
- IV. **No individual rights**
- V. **Supremacy of International law.**

Criticism of Kelson's Theory

Kelson's pure theory of law suffers from certain glaring defects-

- I. His concept of Grund Norm is very **vague and confusing**.
- II. Kelson has **no answer to the question** as to **where from Grundnorm or basic norms derives its validity**.
- III. The **purity of norms cannot be maintained**.
- IV. Friedmann stated that Kelson's theory provides no solution for conflicts arising out of ideological differences.
- V. **Natural laws are ignored**.
- VI. It **excludes** all references of **social facts and felt needs of the society**.
- VII. The concept of **International law is the weakest point of his theory** as he attempts to prove the existence of Grund Norm in International Law also.

Kelson's Contribution:-

Kelson has made an original and valuable contribution to jurisprudence. He **has influenced the modern legal thought**. His views regarding **right, personality, state, public and private law** had received great support.